

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

PAUL WILLIAM NOWACK,

Petitioner,

v.

Case No. 2:04-cv-44  
HON. R. ALLAN EDGAR

FABIAN LAVIGNE,

Respondent.

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**OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S**  
**REPORT AND RECOMMENDATION**

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action. The Report and Recommendation was duly served on the parties. The Court has received objections from petitioner. In accordance with 28 U.S.C. § 636(b)(1), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objection has been made. The Court now finds the objections to be without merit.

Petitioner argues that his procedural default of his jury instruction claim should be excused because his counsel was ineffective for failing to object to the instruction. However, as the Michigan appellate court stated, even if the procedural default was excused, petitioner would not be entitled to relief on this issue. The evidence presented at trial supported petitioner's conviction and any error in the instruction was an error which placed an even greater burden of proof on the prosecutor. Further, petitioner failed to show that his counsel was ineffective. Most importantly, petitioner has failed to show that the Michigan state court decision resulted in a decision that was

contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Further, petitioner's claim that an evidentiary hearing is required in this case is unfounded because there exists no disputed factual issue. A federal habeas court must allow discovery and an evidentiary hearing only where a factual dispute, if resolved in the petitioner's favor, would entitle him to relief and the state has not afforded the petitioner a full and fair evidentiary hearing. *Vroman v. Brigano*, 346 F.3d 598, 606 (6th Cir. 2003).

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is approved and adopted as the opinion of the court.

Dated: *October 5, 2005*

/s/ R. Allan Edgar  
R. ALLAN EDGAR  
UNITED STATES DISTRICT JUDGE